No. 92-1223

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF NAVY, NAVY CBG EXCHANGE, CONSTRUCTION BATTALION CENTER, GULFPORT, MISSISSIPPI, and the U.S. DEPARTMENT OF DEFENSE, ARMY AND AIR FORCE EXCHANGE, DALLAS, TEXAS,

*Petitioners,*

v.

FEDERAL LABOR RELATIONS AUTHORITY and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## MEMORANDUM FOR RESPONDENTS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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The Respondent, American Federation of Government Employees, submits that the *certiorari* petition in this case should be granted so that this Court can determine whether—as the Federal Labor Relations Authority (FLRA) has repeatedly held—it is an unfair labor practice under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 701 *et seq.* (FLRS), for a fed-

eral agency to refuse the request of a labor organization that represents a bargaining unit of the agency's employees to provide the union with the names and home addresses of the unit employees.[1]

The petition states—correctly in our view—that this "case presents a recurring issue on which there is an acknowledged conflict in the circuits," Pet. 8, and that the issue thus squarely presented is of "considerable importance to federal employees," Pet. 13, and, we would add, to the proper functioning of the federal labor relations system. In this regard, it suffices to note that the FLRA has issued more than 60 "names and addresses" cases; that between 1989 and 1992, all of the courts of appeals other than the Tenth Circuit have been called upon to issue a decision in this area; and that the circuits are hopelessly split. *See* Pet. 11-13 (collecting cases).

To avoid any possible misunderstanding, we hasten to add that we most emphatically disagree with the petitioners' claim that the court below erred in upholding the FLRA's ruling that an agency refusal of a union's names and addresses request is an unfair labor practice. *See* Pet. 9-11. At this juncture we would note only the following.

*First*, the FLRA has recognized that "[A] union's statutory responsibilities extend to all bargaining unit members. It is obvious that a union must be able to identify and communicate with those bargaining unit members if it is to adequately represent them." Pet. App. 5a, quoting *Farmers Home Administration Finance Office v. American Federation of Government Employees, Local 3354*, 23 FLRA 788, 796 (1986). Accordingly, the Agency has concluded "that disclosure of the [unit employees] names and addresses was necessary because

[1] It is our understanding that the other respondent herein—the FLRA—is filing a memorandum stating that the Authority does not oppose the granting of the petition.



it would 'enable the Union to communicate effectively and efficiently, through direct mailings to individual employees.'" Pet. App. 6a, quoting *id.*

*Second*, the "agencies have contended, over the life of this dispute, that disclosure of their employees' names and home addresses is 'prohibited by law.'" Pet. App. 10a, citing the Privacy Act, 5 U.S.C. § 552a and the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). Originally "the FLRA and the courts of appeals all agreed that the FLRS and the FOIA together required the disclosure of employees' names and addresses." Pet. App. 15a (collecting cases).

*Third*, this consensus became undone by a disagreement as to the meaning and effect of this Court's decision in *U.S. Department of Justice v. Reporters' Committee*, 489 U.S. 749 (1989). After noting that because of the entirely different contexts of the two cases, *Reporters' Committee* is distinguishable on two different grounds, Pet. App. 19a-20a, the court below stated:

> [W]e think it clear that the Supreme Court's opinion in *Reporters' Committee* is limited to the situation that arises when disclosure is sought under the FOIA alone, such that only the interests served by the FOIA may be included in the balancing. *Reporters' Committee* simply does not apply when disclosure is commanded by some statute other than the FOIA, a statute which borrows the FOIA's disclosure calculus for another purpose. When, as here, disclosure is sought through the FOIA only because the FOIA has been incorporated into another statute as a mechanism for disclosure of information, it is entirely proper and necessary—if all of Congress' aims are to be achieved—to weigh into the balance the interests recognized by the statute which generates the request for information. [Citations omitted.]

Indeed, it would require a particularly convoluted line of reasoning to conclude that the Congress, while

> 1) expressly recognizing the great public interest in collective bargaining, 2) acting to protect that interest, and 3) providing for disclosure of information according to a "formula which encompasses, balances, and protects all interests," would nevertheless forbid the federal courts to consider the public interest in collective bargaining when balancing the interests favoring and opposing disclosure of information which is conceded to be necessary to the full and proper conduct of collective bargaining.

As we will develop if *certiorari* is granted, that is the correct reading of the applicable statutes in question and of *Reporters' Committee*.

## CONCLUSION

For the reasons stated above, the Court should grant the *certiorari* petition in this case.

Respectfully submitted,

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